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INDIAN LAW

I. *COLVILLE CONFEDERATED TRIBES v. WALTON:* CONVEYANCE OF RESERVATION LAND; *WINTERS* RIGHTS TRANSFERRED TO NON-INDIAN PURCHASERS

A. INTRODUCTION

In *Colville Confederated Tribes v. Walton*,[1] the Ninth Circuit faced the complex and often conflicting interests involved in litigation concerning federal, state, and tribal authority over federal Indian reservation lands. The court attempted to balance the competing interests for the water, a limited and vital natural resource, on the Colville Indian Reservation. In so doing, the Ninth Circuit followed traditional principles of reserved water rights. However, the court moved away from the current assimilationist trend which has increased state court jurisdiction[2] over Indian activities.

B. FACTS

In 1872, President Grant created the Colville Reservation to protect the Indian's interest in the land.[3] In 1906, Congress ratified an agreement with the Colville Indians[4] which distributed

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1. 647 F.2d 42 (9th Cir. 1981) (per Wright, J.; the other panel members were Skopil, J. and Curtis, S.D.J., sitting by designation), *cert. denied*, 50 U.S.L.W. 3448 (U.S. Dec. 1, 1981).

2. The assimilationist trend now evident from the recent Supreme Court decisions is discussed and analyzed in Dellwo, *Recent Developments in the Northwest Regarding Indian Water Rights*, 20 NAT. RESOURCES J. 101-21 (1980).

3. Executive Order of July 2, 1872, *reprinted in* 1 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES, 915-16 (1904).

The relevant language from the order is as follows:

> It is hereby ordered that . . . the country bounded on the east and south by the Okanogan River, and on the north by the British possessions be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Id. at 916.

4. Act of Mar. 22, 1906, Pub. L. No. 59-61, ch. 1126, 34 Stat. 80. The agreement was effectuated by presidential proclamation. Proclamation of May 3, 1916, 39 Stat. 1778.

reservation lands to individual Indians according to the General Allotment Act of 1887 (the Act).[5] In 1917, the No Name Creek, a non-navigable waterway located entirely within the reservation, was divided into seven allotments. The defendant, a non-Indian, purchased three of the lots from a non-tribe-member Indian.[6] At the time of purchase, defendant's predecessor had been irrigating thirty-two acres. After purchasing the lots, the defendant obtained state permits and began irrigating 104 acres. Plaintiffs hold rights to the remaining four lots.[7]

The plaintiffs subsisted on salmon and trout until construction of dams on the Columbia River destroyed the salmon runs. In 1968, the plaintiffs, along with the Department of Interior, stocked the Omak Lake with trout. Because the non-indigenous trout required fresh water to spawn, the plaintiffs cultivated the lower No Name Creek as spawning grounds. The defendant, however, depleted the water flow during spawning season when he irrigated his land.[8] The plaintiffs sued to enjoin the depletion. The district court held the plaintiffs' right to the water was superior and, based on a showing of "present need," awarded the plaintiffs sufficient water to irrigate their land but awarded the balance to the defendant.[9] The lower court decided that the tribe had no "current need" for water to maintain its fishing grounds and, therefore, a "reservation of water for such use will not be implied at this time."[10] In addition, the district court held that the state has jurisdiction to grant permits for the excess waters found available.[11]

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5. 25 U.S.C. §§ 331-358 (1976). The Act divided the reservation's land on a per capita basis among the individual tribe members. The purpose of the Act was to encourage the assimilation of the individual tribe members into society. Allotted lands were held in trust for 25 years to protect the Indians from "sharp practices leading to Indian landlessness." *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (1940).

6. 647 F.2d at 45.

7. The federal government holds the remaining four lots in trust for the Colville Tribe. *Id.*

8. *Id.*

9. 460 F. Supp. 1320, 1333 (E.D. Wash. 1978).

10. *Id.*

11. *Id.*

C. Background

Tribal Water Rights

In the landmark case *Winters v. United States*,[12] the Supreme Court held that when a reservation is created out of the public domain there is an implied reservation of water sufficient to sustain the tribal existence.[13] The water right vests on the date the reservation is created and is not lost by non-use.[14] The reserved water right is subject only to appropriations of water made prior to the creation of the reservation. The *Winters* Court, in essence, held that a reservation of water necessary for the land was reserved to support the agricultural use and a "civilized lifestyle."[15] The Court examined the purpose underlying the creation of the reservation and held that sufficient water was reserved to assure that that purpose could be met.[16] *Winters*, however, left unanswered how the amount of water reserved should be determined or what "purposes" are included in the reserved rights.

In *Arizona v. California*,[17] the Court clarified some of the questions left unanswered by *Winters*. The *Arizona* Court extended a right to the amount of water needed to irrigate all of the "irrigable acreage" on the reservation.[18] The Court limited its holding, however, to the agricultural use of the water by the reservation.[19]

Reservations can be created for purposes other than providing for a land-based agrarian society.[20] The extent of water impliedly reserved for such purposes, however, has been limited. In *Cappaert v. United States*,[21] the Court limited the reserved water right to the minimum quantity necessary to satisfy the

12. 207 U.S. 564 (1908).
13. *Id.* at 577.
14. *Id.*
15. *Id.* at 576.
16. *Id.*
17. 373 U.S. 546 (1963).
18. *Id.* at 600-01.
19. *Id.* at 596.
20. Colville Confederated Tribes v. Walton, 647 F.2d at 48. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918).
21. 426 U.S. 128 (1976).

purposes for which the reservation was created.[22] In *United States v. New Mexico*,[23] the Supreme Court reaffirmed this principle when it limited the reserved water rights of a federal reservation to the primary purposes for which the reservation was created and deferred to state law when the purpose was deemed secondary.[24]

At present, courts may reserve the right to the minimum quantity of water needed to fulfill the primary purpose of the reservation. This standard is complicated by the often unarticulated and ambiguous statements of the specific purpose for which a reservation may be created. Therefore, the determination of the reserved water rights requires interpreting the "document and circumstances surrounding the [reservation's] creation, and the history of the Indians for whom it was created."[25]

Although the reserved water rights of the reservation are firmly established, there is serious doubt as to when the use of the reserved water may be altered without forfeiting the reservation's superior right.

The Rights of a Non-Indian Purchaser of Alloted Land Vis-a-vis Indian Allottees

The allotment of reservation land to individual tribe members has created the issue of whether the individuals may transfer the reserved water rights in the land to non-Indians. The allotment of tribal land, accomplished pursuant to the General Allotment Act of 1887 (the Act),[26] allowed for the conveyance of reservation land to individual Indians. After the federal government held the land in trust for twenty-five years, it was con-

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22. *Id.* at 141.
23. 438 U.S. 696 (1978).
24. *Id.* at 702.
25. 647 F.2d at 47.
26. The Act mentions water rights in § 7:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians . . . .

25 U.S.C. § 381 (1976).

veyed in fee to the individual Indians.[27]

The Act expedited the assimilation of reservation Indians into non-Indian culture and society,[28] and the trust period was designed to protect the Indians[29] in the interim. The Act, however, did not address the transferability of water rights, by the Indians holding such land in fee, to non-Indian purchasers.[30]

In *United States v. Powers*,[31] the Supreme Court established the principle that when reservation land was transferred to individual members of the tribe, the individual allottee succeeded to the tribe's *Winters* rights in that land.[32] The *Powers* Court, however, failed to clearly define the nature and extent of those rights. The Court stated in dictum that "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners."[33] Whether the transfer of the allotment by the Indian allottee to a non-Indian includes the reserved water rights is unclear. The strongest statement on non-Indian rights to reserved water is found in *United States v. Ahtanum*.[34] In *Ahtanum*, the Ninth Circuit held that when allotted lands are conveyed to a non-Indian, the transferee is entitled to "participate rateably" with Indian allottees.[35]

Because the Allotment Act does not express whether non-Indians succeed to the Indian allottee's water rights, the courts must construe the congressional intent behind the Act. The general rule of interpretation requires that " '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent on its protection and

27. *Id.* § 348.

28. REPORT OF THE SECRETARY OF THE INTERIOR, PROCEEDINGS OF THE MOHONK LAKE CONFERENCE, H.R. EXEC. DOC. No. 75, 49th Cong., 2d Sess. 992 (1887).

29. F. COHEN, *supra* note 5, at 221.

30. 25 U.S.C. § 381 (1976). For the relevant text of § 381, see note 26 *supra*.

31. 305 U.S. 527 (1939).

32. *Id.* at 532.

33. *Id.*

34. 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *modified*, 330 F.2d 897 (9th Cir. 1964). *See also* United States v. Adair, 478 F. Supp. 336 (D. Or. 1979); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928). The right to transfer water rights when alloted lands are leased was upheld by the Ninth Circuit in Skeem v. United States, 273 F. 93 (9th Cir. 1921).

35. 236 F.2d at 342.

good faith.' "[36] Many questions still confront the courts under the issue of non-Indian rights to reserved water. The Supreme Court has yet to determine congressional intent under the Allotment Act insofar as it affects the transferability of reserved waters. In addition the nature and extent of the allottee's water rights and those of any successors are not clearly defined.

State Power to Regulate Water Use Within the Reservation

With the increased importance of water in the western states, the reserved water rights of Indian reservations have become crucial. Courts are confronted not only by increasing conflict over ownership of water rights between Indians and non-Indians, but also over who shall have the authority to determine those rights.

The Supreme Court has steadily increased the number of areas in which states may take jurisdiction over matters previously considered under either federal or tribal authority.[37] This trend by the Court has been termed an assimilationist policy.[38] State jurisdiction, however, is barred when pre-empted by federal law or when it unlawfully infringes on the right of the reservation Indians to self-government.[39]

In *Federal Power Commission v. Oregon*,[40] the Court barred state regulation of water use on federal reservations absent an explicit recognition of the state's authority.[41] Congress recognized the state's authority to regulate water on the public domain in a series of Acts culminating in the Desert Land Act of 1887.[42] The Court, in *California Oregon Power Co. v. Beaver Portland Cement Co.*,[43] considered this legislation before holding that Congress had given the states plenary authority over water on the public domain.[44] *California Oregon Power Co.* was

36. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973) (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).

37. *See* Dellwo, *supra* note 2, at 101.

38. *Id.*

39. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980).

40. 349 U.S. 435 (1955).

41. *Id.* at 448.

42. Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. §§ 321-323 (1976)).

43. 295 U.S. 142 (1935).

44. *Id.* at 163-64.

affirmed by the Supreme Court in *New Mexico*. The *New Mexico* Court expressed the view that "Congress almost invariably defers to state water law."[45] In *California v. United States*,[46] the Court stated that the rationale behind deference to state law stems from the desire to avoid the "legal confusion that would arise if federal water law reigned side by side in the same locality."[47] However, the Desert Land Act did not intend to remove Congress' authority over unappropriated water on land withdrawn from the public domain.[48]

Jurisdiction to adjudicate reserved water rights on Indian land has also been granted by the McCarran Amendment.[49] In *United States v. District Court for Water Division No. 5*,[50] the Court held that the McCarran Amendment gave state courts jurisdiction to hear federal water rights cases.[51] The Court extended its holding to include the adjudication of *Winters* rights in *Colorado River Water Conservation District v. United States*.[52]

A state's authority to regulate water within a federal reservation will depend on an expression of federal intent to give the states such power. The trend of the recent Supreme Court decisions signals an increasing expansion of the state's power to regulate water rights.[53]

Tribal sovereignty has to a considerable degree prevented intrusions of state law into Indian land. However, in *Montana v.*

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45. 438 U.S. at 696.
46. 438 U.S. 645 (1978).
47. *Id.* at 668-69.
48. Arizona v. California, 373 U.S. 546, 597-98 (1963).
49. Section 208(a) of the McCarran Act provides:

> Consent is given to join the United States as defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a) (1976).
50. 401 U.S. 527 (1971).
51. *Id.* at 529.
52. 424 U.S. 800 (1976).
53. *See* Dellwo, *supra* note 2.

United States,[54] the Court recently stated that a "tribe's inherent power to regulate generally the conduct of non-members on land no longer owned by, or held in trust for, the tribe was impliedly withdrawn as a necessary result of its dependent status."[55] The *Montana* Court excepted from the implied withdrawal of tribal authority the conduct of non-members that "threatens or has some direct effect on the health and welfare of the tribe."[56]

D. The Ninth Circuit Decision

Tribal Water Rights

The plaintiffs argued that the tribe had superior reserved water rights to No Name Creek waters and that there was insufficient water to satisfy both parties' needs. The defendants claimed water rights on two theories. First, they claimed rights as successors to Indian allottees. Second, they claimed appropriative rights perfected under state law.

The Ninth Circuit began its analysis by comparing *Colville* with *Winters* and *Arizona*.[57] The court stated that Congress had the power to reserve unappropriated waters for "specific federal purposes"[58] and that where it is necessary an implied reservation will be found to "fulfill those purposes."[59] Furthermore, it was Congress' intention "to deal fairly with the Indians by reserving waters without which their lands would be useless."[60] In holding that water had been reserved for the reservation, the court stressed that the members of the reservation had relinquished extensive land and water holdings.[61] The Ninth Circuit concluded that because the "Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights,"[62] Congress intended to reserve water for them.

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54. 101 S. Ct. 1245 (1981).
55. *Id.* at 1257.
56. *Id.* n.15.
57. 647 F.2d at 46.
58. *Id.*
59. *Id.* (quoting United States v. Winters, 207 U.S. 564, 576 (1908)).
60. 647 F.2d at 47.
61. *Id.* at 46-47.
62. *Id.* at 46.

Next, the court decided the extent of those reserved rights. The Ninth Circuit expanded the *New Mexico* test to consider the effect of changed circumstances on the reservation's reserved water rights. The court reasoned that the original purpose for which the water was reserved—to provide a homeland—allowed the reservation to use the reserved water for more than just irrigation. Because the Colville Indians traditionally relied on both salmon and trout for survival, the court held that the reservation could use the reserved waters to develop and replace fishing grounds destroyed by the dams.[63]

The implied reservation of water rights for the fishing grounds was based on their "economic and religious"[64] importance. The *Colville* court elevated the fishing rights of the reservation to the level of a primary purpose within the *New Mexico* test and found that the reservation was created to preserve such rights.[65] The Ninth Circuit thereby expanded the reserved water rights under the *Winters* doctrine to include preservation of the Indians' fishing grounds. The court, however, went on to define the scope of the reserved water rights to include their use "in any lawful manner."[66] Further, "subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water."[67] In addition, the court stated that it would be consistent with the general purpose of "providing a homeland" to allow the Indians themselves to determine how reserved waters should be used.[68]

The Rights of a Non-Indian Purchaser of Allotted Lands Vis-a-vis Indian Allottees

The Ninth Circuit, reversing the district court, held that a non-Indian had rights to reserved water.[69] The *Colville* court limited the non-Indians' rights, however, to water being appropriated at the time the non-Indian acquired title and to water

63. *Id.* at 48.
64. *Id.*
65. *Id.* at 47-48.
66. *Id.* at 48.
67. *Id.*
68. *Id.* at 49.
69. The district court held that the *Winters* reserved rights did not apply per se to allotments owned by non-Indians. 460 F. Supp. at 1326.

appropriated thereafter with "reasonable diligence."[70] The water so appropriated would be given a "date-of-reservation" priority.[71] The non-Indian would lose his water rights, however, if he could not demonstrate a continuous use.[72]

The court examined the intent of the General Allotment Act and the nature of the allottee's rights. The *Colville* court affirmed the Indian allottee's right to use reserved waters and stated that as a general rule the "termination or diminution of [those] rights requires express legislation or a clear inference of Congressional intent."[73] Notwithstanding the district court's decision, the Ninth Circuit found that, absent the legislation or clear inference, the allottee's rights to reserved waters were protected. The court reiterated that Congress designed the trust period to protect the allottee and once that period expired the allottee could freely transfer his or her land.[74] By then denying the allottee the ability to transfer the allotment with reserved water rights after the trust period expired, the allotment would be rendered less valuable, constituting a de facto limitation on transferability. Therefore the limitation was a diminution of the allottee's rights unsupported by any "Congressional intent" or "express legislation."[75]

The Ninth Circuit answered the questions left open by the *Powers* Court[76] as to the extent of the right acquired by non-Indian purchasers. The court cited *Ahtanum*,[76.1] to determine that three factors control the extent and nature of these rights. First, the number of "irrigable acres" the allottee owns determines the maximum amount of water the non-Indian has a right to.[77] Second, the priority date of that right determines the value of the allottee's right.[78] Third, the Indian retains his reserved

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70. 647 F.2d at 51.

71. *Id.*

72. *Id.*

73. *Id.* at 50.

74. The purpose of the trust was to protect Indians from being robbed of their land. *See* F. COHEN, *supra* note 55, at 221.

75. 647 F.2d at 50.

76. *See generally* text accompanying notes 31-35 *supra*.

76.1. United States v. Ahtanum, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), *modified*, 330 F.2d 897 (9th Cir. 1964). *See also* United States v. Adair, 478 F. Supp. 336 (D. Or. 1979); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

77. 647 F.2d at 51.

78. *Id.*

water right despite non-use; the non-Indian does not.[79]

State Power to Regulate Water Use Within the Reservation

The Ninth Circuit rejected the defendant's argument that the state of Washington controlled the force or effect of water permits within the reservation. In support, the court determined that the creation of the reservation pre-empted the state's authority over the land.[80]

1. Federal Pre-emption

The Ninth Circuit stated that the creation of the reservation pre-empted the state's regulatory power over No Name Creek.[81] The court cited *Federal Power Commission* to support the principle that the state can only regain its regulatory power over federal reservations by "explicit federal recognition."[82]

In rejecting the defendant's arguments, the court examined the rationale behind the usual policy of deferring to the states when water rights were involved. The *Colville* court stated that the usual policy of deferring to the state law does not apply here because No Name Creek is non-navigable and entirely within the reservation. Therefore, "state regulation of some portion of its waters would create the jurisdictional confusion the Congress has sought to avoid."[83] Also, the court found no impact on the state if either the tribe or the federal government regulated the water.[84]

2. Tribal Sovereignty

The court agreed that the *Montana* decision withdrew much of the tribe's inherent power to regulate non-members on land no longer held by the reservation.[85] However, the Ninth Circuit recognized the critical importance of the water system to the reservation. Citing the exceptions to the rule in *Montana*, the

79. *Id.*

80. *Id.* at 52-53.

81. *Id.* at 52. Enroute to its decision, the court discussed the federal pre-emption doctrine and the inherent authority of the tribe, but did not decide which doctrine was controlling.

82. *Id.*

83. *Id.* at 53.

84. *Id.* (citing Federal Power Comm'n v. Oregon, 349 U.S. 435, 448 (1955)).

85. 647 F.2d at 52.

court stated that the "water system is a unitary resource. The actions of one user have a direct and immediate effect on other users."[86] Therefore, regulating the water is critical to the Indians and an important sovereign power that the *Montana* Court did not impliedly withdraw.[87]

E. SIGNIFICANCE

In *Colville*, the Ninth Circuit panel faced the growing and crucial question of what rights in reserved water may be transferred when a non-Indian purchases reservation lands. In addition, the court decided which entity would have the ultimate authority to adjudicate those rights. The decision reflects an equitable compromise which gives non-Indian transferees some degree of certainty over the amount of water they may use and appropriate without fear of its loss to a superior reserved right held by the reservation. Perhaps most significant in *Colville* is the court's holding that the non-Indian has a "rateable" share of the reservation's reserved water rights.

The growing intrusion of state authority to adjudicate non-Indian rights on reservation lands has to some extent been limited in regard to water rights.[88] The Ninth Circuit expressed its preference for relegating state authority to both federal preemption and tribal sovereignty. The reliance on federal preemption principles, however, may signal another blow to the scope of Indian tribal self-government.[89] In considering this, the court stated that Indians should have the power to determine to what uses reserved water may be put so long as that use is consistent with "general purpose for the creation of an Indian reservation."[90]

The growing importance of water rights in the western states will inevitably force further confrontations between the conflicting interests.[91] The Ninth Circuit took a giant step to-

86. *Id.*

87. *Id.*

88. The Ninth Circuit dismissed the application of the McCarran Act without discussion. *Id.* at 53.

89. *See* 10 GOLDEN GATE U.L. REV. 315, 350-57 (1980).

90. 657 F.2d at 49.

91. *See* Laird, *Water Rights: The* Winters *Cloud Over the Rockies: Indian Water Rights and Development of Western Energy Resources*, 7 AM. INDIAN L. REV. 155 (1979).

wards resolving any subsequent conflicts by defining the nature and extent of water rights non-Indian purchasers acquire in reservation lands. In addition, deciding that the federal government should adjudicate conflicts involving those rights will increase the likelihood that a more systematic and uniform approach will be followed.

Colville leaves an important issue unresolved. The permissible use of water found to be impliedly reserved under the *Winters* doctrine due to changing customs and habits of the Indian lifestyle remains unclear. The ambiguous and often "unarticulated"[92] purposes of a reservation may make it possible to determine the implied use of reserved water only on a case-by-case basis. The Ninth Circuit's expression that the Indians should have the power to determine what would best serve the reservation's interests may be either an equitable solution or a fleeting hope for Indian sovereignty.

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II. OTHER DEVELOPMENTS IN INDIAN LAW

In other cases, the Ninth Circuit refused to categorize Indians displaced by coal mining operations as "displaced persons" and held that descendants of a treaty-signatory tribe must maintain an organized tribal structure to assert treaty fishing rights.

A. Narrow Interpretation of "Displaced Persons"

In *Austin v. Andrus*,[1] the Ninth Circuit refused to define "displaced persons" to include Indians where the displacement did not stem from an acquisition by a federal or state agency. A Bureau of Indian Affairs study determined that coal could be mined profitably on reservations and used for coal fired power plants.[2] Subsequently, the plaintiffs, the Navajo tribe, authorized a Peabody Coal Company subsidiary to explore the Navajo

92. 657 F.2d at 47.

1. 638 F.2d 113 (9th Cir. 1981) (per Poole, J.; the other panel members were Merrill, J. and Brown, D.J., sitting by designation).

2. *Id.* at 114.

Reservation for minerals.[3] Following Bureau of Indian Affairs approval, Peabody Coal conducted exploratory drilling, then negotiated leases for mining rights.[4]

In 1970, Peabody Coal began mining the land. In 1975, the plaintiffs claimed that the mining displaced them from their homes and applied for Federal assistance as "displaced persons" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the Relocation Act).[5] The Department of the Interior rejected their claim. The plaintiffs sued for a declaratory judgement in 1976 and moved for summary judgment in 1977. The government cross-motioned to dismiss or, in the alternative, for summary judgment. The district court granted summary judgment for the government[6] and plaintiffs appealed.

In affirming the lower court's decision, the Ninth Circuit first examined the Relocation Act's definition of "displaced persons."[7] Section 101(6) of the Relocation Act limits the phrase "displaced persons" to those who relocate because of a federal agency's "acquisition of such property" to undertake programs or projects.[8] Within this definition, the *Austin* court focussed on the meaning of acquisition.

The Ninth Circuit noted that although the Supreme Court construed section 101(6) in *Alexander v. HUD*,[9] the Court left

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3. *Id.* The Coal Company also contracted with the Hopi and the Navajo to explore several thousand acres of the Navajo-Hopi Joint Use Area.

4. *Id.* The Department of the Interior approved the leases.

5. 42 U.S.C. §§ 4601-4655 (1976). Plaintiffs argued that under § 101(6), 42 U.S.C. § 4601(6), they come within the meaning of "displaced persons." For the text of § 101(6), see note 8 *infra*.

6. 638 F.2d at 115.

7. *Id.* at 115-16.

8. Section 101(6) states in part:

> The term "displaced person" means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance . . . .

42 U.S.C. § 4601(6) (1976).

9. 441 U.S. 39 (1978).

open the definition of acquisition.[10] The *Alexander* Court acknowledged, however, that lower courts, led by the Eighth Circuit in *Moorer v. HUD*,[11] have construed acquisition to include only actions of public entities.[12] The *Austin* court then adopted the *Moorer* rationale that Congress intended the Relocation Act "to benefit those displaced by public agencies with coercive acquisition power, such as eminent domain."[13] The *Moorer* court found the critical inquiry was "whether the person involved was displaced by governmental action" rather than the degree of Federal or state agency involvement.[14]

Other circuits have adopted the *Moorer* test.[15] Finding that *Moorer* furnished a rational rule,[16] the *Austin* court employed that test to affirm the summary judgment.[17]

B. Organized Tribal Structure Required to Assert Treaty Fishing Rights

In *United States v. Washington*,[18] the Ninth Circuit held that a group of Indians who descended from a treaty-signatory tribe could not assert treaty fishing rights because they had failed to maintain an organized tribal structure. Following a district court decision that the treaty tribes were entitled to fifty percent of the harvestable fish on their traditional off-reservation fishing grounds,[19] several groups of Indians, including the

10. 638 F.2d at 116. The *Alexander* Court construed the "written order" portion of § 101(6) and did not reach the scope of the acquisition clause. 441 U.S. at 117. See note 8 *supra* for the relevant portions of § 101(6).

11. 561 F.2d 175 (8th Cir. 1977), *cert. denied*, 436 U.S. 919 (1978).

12. 441 U.S. at 48 n.9.

13. 638 F.2d at 116 (quoting Moorer v. HUD, 561 F.2d 175, 182 (8th Cir. 1977), *cert. denied*, 436 U.S. 919 (1978)).

14. 561 F.2d at 183.

15. 638 F.2d at 117 (citing Dawson v. HUD, 592 F.2d 1292 (5th Cir. 1979); Conway v. Harris, 586 F.2d 1137 (7th Cir. 1978)).

16. 638 F.2d at 117.

17. The court also addressed plaintiff's second claim that the government owed them a fiduciary obligation. The court found that even if this relationship existed, it would not qualify the plaintiffs as "displaced persons." *Id.*

18. 641 F.2d 1368 (9th Cir. 1981) (per Wright, J.; the other panel members were Canby, J. and Patel, D.J., sitting by designation), *cert. denied*, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982).

19. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Until this decision the Indians had removed only a about five percent of the fish harvest. 641 F.2d at 1371.

appellants, intervened to assert fishing rights.[20] Although the Indians in the instant case were descendents of treaty-signatory tribes, their ancestors had lived outside the reservation. Likewise, the plaintiffs lived among non-Indians and were not federally recognized.

The United States and other appellees claimed that the Indians were not entitled to fishing rights because they lacked federal recognition, a geographic base, and formal tribal control over members.[21] The district court agreed and limited the exercise of treaty fishing rights to those tribes recognized as Indian political bodies by the United States.[22]

In affirming the lower court, the Ninth Circuit disapproved the federal recognition standard used by the district court.[23] The *Washington* court also explained the Ninth Circuit view of the "single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure."[24]

The court found the sole reason for the condition is to identify the group asserting the treaty rights as the group named in the treaty.[25] This condition was met where some "characteristic of the original tribe persists in an evolving tribal community."[26] The Ninth Circuit recognized two difficulties with the treaty-tribe standard. First, the assimilation of the Indians into non-Indian communities destroyed some or all of the tribe's distinctiveness.[27] Second, "a tribal structure that never existed cannot be maintained."[28] Thus, once assimilation of the tribe is completed, the tribe can no longer claim tribal rights.[29] This result is dictated by the "communal nature of tribal rights."[30]

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20. United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979).
21. 641 F.2d at 1371.
22. *Id.* at 1372.
23. *Id.*
24. *Id.* at 1372.
25. *Id.* at 1373.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

The panel rejected the plaintiff's evidence of tribal organization and held "political and cultural cohesion" insufficient to support the assertion of tribal treaty fishing rights[31] because the plaintiffs failed to "clearly establish the continuous informal cultural influence" concededly required to achieve treaty-tribe status.[32]

The *Washington* panel further held that the Indians asserting the treaty rights had the burden of proving they were extant tribes at the time the treaty was signed.[33]

The dissent argued that the district court's findings were so permeated with the federal recognition standard that the entire factual inquiry was deficient. Specifically, the district court made no finding as to "the nature and degree of tribal organization existing at the time [of] the treaties."[34]

Thus, in the Ninth Circuit, treaty-tribe status requires a very strong showing of cultural and political tribal cohesiveness. Furthermore, the burden of such a showing is squarely on the group asserting the treaty rights. Overall, the decision diminishes existing tribal treaty rights. It may well result in a decrease in the assimilation of Indians into non-Indian communities due to a fear of losing treaty rights. The *Washington* panel rejected the district court's recognition standard but applied a strikingly similar approach to deprive assimilated Indian tribes of vested treaty rights.

31. *Id.* The Indians pointed to the management of interim fisheries, pursuit of individual members claims, and social activities as evidence of tribal organization.

32. *Id.*

33. *Id.* at 1374.

34. *Id.* at 1375.